1960

State of Utah v. Joseph Ersol Berchtold : Brief of Respondent

Utah Supreme Court

Walter L. Budge; Vernon B. Romney; Attorneys for Respondent;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOSEPH ERSOL BERCHTOLD,
Defendant and Appellant.

Case No.
9265

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

While appellant's Statement of Facts contains most of the basic essentials of the case, he has gone far afield in the recitation of superfluous material and in arguing the evidence.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO QUASH THE INFORMATION.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO DISMISS AND IN REFUSING TO GRANT HIS REQUESTED INSTRUCTION NO. 1 FOR ANY OF THE REASONS SET FORTH IN HIS POINT II.

POINT III.

THE COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S INSTRUCTION NO. 10 IN ITS ENTIRETY.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO QUASH THE INFORMATION.

Appellant's main argument seems to be that the acts described in the bill of particulars are not such as

constitute "reckless disregard of the safety of others" (41-6-43.10, U. C. A. 1953), and that, therefore, no cause of action is stated in the information as modified by the bill.

He goes to great effort to show error in the court's denial of his motion to quash, but does so without the aid of any Utah cases.

He proceeds at the outset to misinterpret the plain meaning of the phrase in the bill of parctiulars, "* * * in excess of 70 miles per hour * * *", failing to realize that "in excess of" might mean any speed above that figure. It does not mean *just* 70.

He conveniently avoids a line of Utah law most helpful to respondent and offers instead citations from Colorado and California dealing primarily with the question of speed (ranging from 35 to 73 miles per hour). His cases are concerned with whether such speeds constitute "willful misconduct"; and without citing any authority for his statement, (Appellant's Brief, pg. 22) he seems to indicate that the term "willful misconduct" is an expression interchangeable with "reckless disregard for the safety of others."

It will be noted by this court, of course, that appellant's cases are worthy of attention only as they apply to defendant's own version of the facts; that is, that he was travelling somewhere around 70 miles an hour. They can provide the court no guidance what-

ever, though, in light of the testimony of the State's expert witness, a Ph.D. in physics, that appellant was travelling at least 110 miles per hour and perhaps greatly in excess of that figure, and of other evidence that this occurred on a curved road at night with defendant driving so recklessly as to be wholly unable to keep the car on the road (T. 16-18, 24-26, 292, 304-305). Apparently, this was the evidence believed by the jury, and not defendant's own testimony as to a lesser rate.

Certainly, a holding by the court of a sister state to the effect that driving up to 60, 70, or 73 miles per hour does not constitute "willful misconduct" should not obligate this court to hold that driving in *excess* of 70 miles per hour (actually, as proven, more than 110 miles an hour), along with the other circumstances present, does not constitute "reckless disregard of the safety of others".

Fortunately, we are not without local precedent as to the meaning of "reckless disregard for the safety of others", the crucial words in the information and the statute out of which it arose. In *State* v. *Lingman*, 97 Ut. 180, 91 P. 2d 457, an involuntary manslaughter case, defendant was accused of driving approximately 40 miles per hour into an intersection, "which speed was excessive in view of the width, construction and obstructions of the said driver's view along the said highway and the hazard of the intersection * * *",

the bill of particulars further providing that the defendant was driving and operating the automobile carelessly and heedlessly, with willful and wanton disregard for the rights and safety of others, and without due caution and circumspection, and at such a speed and in such a manner as to endanger life. The court at page 468 observed that * * * The very act as charged involves recklessness and a marked disregard for the safety of others. * * *"

In *State* v. *Clark,* 118 Ut. 517, 223 P. 2d 184, the court adopted, as a definition of "criminal negligence" sufficient to bring a driver under the involuntary manslaughter statute, a term very much similar to that used repeatedly in the instant case. There, the court used the phrase: "recklessness or with a marked disregard for the safety of others." In that case, the court stated at page 189 that the question was one for the jury. It said they might well reason that a person driving 30 to 35 miles per hour on an icy road was "reckless and indifferent of consequences." The court then stated that there is no hard and fast rule for measuring recklessness. Here, of course, the evidence indicates the probability that Berchtold was driving three times as fast as the defendant drove in the *Clark* case, under somewhat different, but similarly dangerous circumstances.

In *State* v. *Riddle,* 112 Ut. 356, 188 P. 2d 449, the court held that where a driver on a curve in the

dark, permitted his automobile to go onto the left side of the road, reasonable jurymen "not only might fairly conclude that he was guilty of 'reckless conduct or conduct evincing a marked disregard for the safety of others', but could hardly conclude otherwise". Here defendant completely lost control and allowed his car to go off the side of the road.

This court held in *State* v. *Read,* 121 Ut. 453, 243 P. 2d 439, that where defendant's car hit a pedestrian, knocking him 61 feet, on a clear, dry, even, straight street, not curved, as here, and where skid marks extended 141½ feet and where defendant had been doing some drinking, as defendant had here, and there was alcohol in his car, the jury could reasonably find that his conduct constituted criminal negligence of a degree to bring him under the involuntary manslaughter statute, despite his own testimony that he had drunk only one glass and a portion of a bottle of beer, and that he was travelling only 25 miles per hour.

It seems clear then that reasonable minds could hardly otherwise conclude than that driving an automobile in the nighttime on a narrow country road around a curve in excess of 110 miles an hour was an act in reckless disregard of the safety of others.

To hold to the contrary would tend to nullify the negligent homicide statute and open the door to travel at speeds even in excess of those presently con-

templated by the mind of man on any kind of a road under any circumstance of curvature at any time of day or night.

Turning from the substantive law involved to the matter of how far a prosecutor must go in answering a defendant's request, respondent has found that the Utah court in *State* v. *Lack,* 118 Ut. 128, 221 P. 2d 855, held that a bill of particulars need not plead matters of evidence and that the statute providing for such bill was not intended to compel the prosecution to give the accused a preview of the evidence upon which the state was to rely. Nor was defendant in the instant case handicapped in any way in the preparation of his defense by what the bill contained. (See *State* v. *Russell,* 106 Ut. 116, 145 P. 2d 1003).

If, indeed, the appellant was unable to make out in his mind a cause of action from the information in the first bill of particulars, he was at perfect liberty to request a supplemental bill, which he failed to do. (See Section 77-21-3, U. C. A. 1953.)

As a matter of substance, then, the information, as modified, did constitute a cause of action and as a matter of procedure, appellant was remiss in failing to exhaust his ready and simple remedies at the time.

POINT II.

THE COURT DID NOT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION

TO DISMISS AND IN REFUSING TO GRANT HIS REQUESTED INSTRUCTION NO. 1 FOR ANY OF THE REASONS SET FORTH IN HIS POINT II.

Appellant presents a hodge-podge of assertions under his Point II, the main burden of which is to indicate error on the part of the court in not granting defendant's motion to dismiss or his request for a directed verdict.

Speaking generally as to such motions, our courts have held that it is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered by the state be weak or strong, in conflict or not controverted. Evidence may be ever so convincing as to the guilt or innocence of a party charged, yet it is for the jury and not the trial judge to render the verdict. *State* v. *Green*, 78 Ut. 580, 6 P. 2d 177 states:

> "Wherever there is adduced in a criminal prosecution competent evidence from which a jury can possibly find beyond reasonable doubt that the defendant committed the crime with which he is charged, there will no error in failing to direct a verdict of acquittal."

As to the three questions of motion to dismiss, motion for directed verdict and motion for a new trial, the court recently spoke in the case of *State* v. *Penderville*, 2 Ut. 2d 281, 272 P. 2d 195, as follows:

> "* * * It has been repeatedly held by this court that upon a motion to dismiss or to direct a verdict of not guilty for lack of evidence that the trial court does not consider the weight of the evidence or credibility of the witnesses, but determines the naked legal proposition of law, whether there is any substantial evidence of the guilt of the accused, and all reasonable inferences are to be taken in favor of the state. * * * As is pointed out in one or more of these cases, the trial court had a discretion in the case of a motion for a new trial that it does not have in case of a motion to dismiss or to direct a verdict of not guilty. Nevertheless, in either case if there is before the court evidence upon which reasonable men might differ as to whether the defendant is or is not guilty, he may deny the motion."

Again in *State* v. *Erwin,* 101 Ut. 365, 120 P. 2d 285 the court said:

> "* * *, if there is any substantial evidence * * *, then the weight of the evidence is for the jury, and the court will not disturb the verdict."

In *State* v. *Lewellyn,* 71 Ut. 331, 266 P. 261, the court stated:

> " ' "It is only in the *absence of any evidence* tending to establish the guilt of the accused that the trial court will be authorized to grant a peremptory instruction directing his acquittal." ' * * *
>
> 'The same principle is decided in *State* v. *Gross,* (Ohio), 110 N. E. 466.

'An able discussion and determination of the bounds of judicial authority in considering a motion for a directed verdict is contained in *Isbell* v. *U. S.*, 142 C. C. A. 312, 227 F. 788, in which it is made clear that the court in such case does not consider the weight of evidence or credibility of witnesses but determines the naked legal proposition of law whether there is any substantial evidence of the guilt of the accused. This is undoubtedly the correct rule. See annotation "Directing Acquittal", 17 A. L. R. 910. The function of a court in dealing with an application for a directed verdict must not be confused with that in considering a motion for a new trial upon the grounds of insufficiency of evidence. The court has a discretion in the latter case which he does not properly have in the former. The reason for the distinction is that the order sought in one case acquits the accused and finally ends the prosecution, while in the other, the order, if granted, does not discharge the accused but merely gives him the advantage and benefit of another trial. The rule is controlled by the same principles in criminal cases as in civil procedure. And in a civil case, *Stam* v. *Ogden P. & P.*, 53 Utah 248, 177 P. 218, this court said:

' "It is familiar doctrine in this jurisdiction and perhaps in nearly every other where the jury system prevails, that, if there is any substantial evidence whatever upon which to base a verdict, the court will not withdraw the case from the jury or direct what their verdict should be." ' "

Appellant urges nine reasons why his Motion to Dismiss and his requested instruction for a directed

verdict should have been granted by the court. None of the reasons has any substantial merit. Appellant seems merely to be arguing the evidence as he should have done to the jury. Furthermore, he cites no cases whatsoever in support of any of the assumptions under his Point II.

Having now laid out general rules, respondent will address itself to certain specific sub-points raised under Point II of appellant's brief.

(a) *That the testimony of the officers was conflicting.*

The full answer to sub-points (a), (b), and (c) is that the weighing of the evidence is the sole prerogative of the jury.

We will assume (but not admit) for the purpose of answering appellant's sub-point (a) that the testimony of the officers was conflicting. This constitutes no legal basis, however, for a motion to dismiss.

The testimony of the two officers could have been absolutely opposite in every pertinent detail and still the court would not have been justified in dismissing or directing a verdict. The jury was at absolute liberty to believe all the testimony of one of the officers, while disbelieving all that of the other and in relying for its verdict wholly upon the testimony of the one.

On the other hand, the jury was free to believe portions of the testimony of both officers, while dis-

believing portions of that of both, thus arriving at apparent truth upon the basis of which it could render its verdict.

If the testimony was in conflict it was up to the jury to pick out which portions, if any, of that of either officer it could believe. It was not the prerogative of the court either to accept or reject the testimony of the officers or to assume to take the determinaion as to the merit of such testimony from the jury. If any evidence tending to support the guilt of defendant came before the jury it was up to the court to allow the case to go forward.

(b), *appellant's claim that physical evidence given by the officers, particularly measurements at the scene, was physically an impossibility.* It appears that appellant is setting himself up as sole arbitrer and that he is presuming to perform the functions of the jury. If the allegations could not possibly have been true, the jury would have so determined. It was up to the appellant to argue such evidence to the jury and is not his place, now, to urge this court to pass upon the merits of it.

(c), *the alleged false premise used in the calculations of the State's expert witness.* The truth or falsity of his premise is neither self-evident nor conclusive regardless how it may appear to appellant. Again, this is a fact question and the jury evidently found differently.

(d), *appellant's claim that the testimony of the State's expert witness was speculative and thus caused the jury to speculate on its verdict.* In so urging, ap- appellant merely argues portions of the evidence. The testimony of Dr. Woods was based on certain specific research, the details of which were brought out by appellant's counsel on cross-examination, that being the proper way of handling the matter. He now attempts to use the wrong forum for his argument, having failed in his effort to convince the jury.

As appellant well knows, an expert witness is not limited in the same way as an ordinary witness. He may give his opinions as long as they are based on study, research, or examination, and he may also testify to hypothetical situations. As a consequence, his testimony may tend to include a rather wide range of probabilities. To so testify is not to speculate and the jury was under the same obligation in weighing his statements as it was in weighing those of other witnesses. Dr. Woods' testimony was weighed and not found wanting, and it is too late now for appellant to complain.

(e), *appellant's statement that no direct testimony appears in the record that defendant exceeded the speed of* 65 *miles an hour.* The reason for this, of course, is that the actual witnesses are dead because of appellant's recklessness. While there is no direct testimony as to anybody reading on the speedometer a speed in excess of that figure, it has long been recog-

nized that an expert, such as Dr. Woods, may testify as to speed based upon research made after the crash. See *State* v. *Lingman,* 97 Ut. 180, 91 P. 2d 457; *State* v. *Read,* 121 Ut. 453, 243 P. 2d 439. Certainly, the jury was at liberty to believe Dr. Woods' testimony, instead of the unsupported self-serving statements of the appellant.

This court held in *State* v. *Shonka,* 3 Ut. 2d 124, 279 P. 2d 711 that the jury was not absolutely bound to believe all the testimony of a defendant and that it need give it only such weight as the facts and circumstances surrounding the occurrence, including the self-interest of the witness, required. It said that self-interest or improbability can be used to discredit or discount the testimony of a witness and substantive direct evidence, though uncontradicted, may be disbelieved by a jury where the witness is a party or otherwise interested.

We have already cited cases under our Point I, dealing with the matter of speed. While it can be argued that driving 65 miles an hour is not reckless disregard for the safety of others under the driving conditions and other circumstances of this case, still it would be farcical and the product of a wild imagination to hold that driving 110 miles an hour or more under the same circumstances does not constitute reckless disregard for the safety of others, a measure of defendant's recklessness being demonstrated in testimony that his car, after leaving the highway, severed

a utility pole near the base and continued 69 feet further through a field before coming to rest (T. 18). The jury, obviously, did not rely on defendant's evidence alone, but took the liberty of believing testimony as to a much higher rate of speed. Incidentally, while there might be some question as to the speed achieved by defendant—that is, over 110 miles per hour—there can be little question of the car's ability to so perform. A body mechanic testified (T. 267) that without having done anything whatsoever to the motor, but after making repairs on the car's body, he drove the vehicle in excess of 120 miles per hour after the accident.

(f), *appellant's argument that the accident resulted from momentary indecision of the driver after reaching gravel deposits negligently left by highway officials at the "Y" of the highway.* The jury was fully apprised of this argument and failed to buy it. Certainly, appellant's argument cannot be adopted as a matter of law. The court could not, as it did not, have invaded the province of the jury to the extent of directing a verdict on this theory.

Respondent believes sub-point (g) of appellant's brief is merely a reiteration of his prior arguments and that it does not need special emphasis; and that (h) appears to be the same in substance as (d).

POINT III.

THE COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S INSTRUCTION NO. 10 IN ITS ENTIRETY.

All of appellant's requested instruction No. 10 that conforms to Utah law was covered in substance by instructions actually given.

A defendant, of course, has no right to have instructions stated in his own words where the applicable law is otherwise given by the court. *State* v. *Cox,* 106 Ut. 253, 147 P. 2d 858.

It is enough that an instruction properly states the law as applied to the facts in issue. *State* v. *Rosenberg,* 84 Ut. 402, 35 P. 2d 1004.

As to the matter of instructions being considered as a whole, the attention af the court is referred to *State* v. *Evans,* 74 Ut. 389, 279 P. 950, and *State* v. *Hendricks,* 123 Ut. 267, 258 P. 2d 452. The proper law, as concerning the facts at hand, is that given by the court in its instruction No. 3.

The requested instruction is in some measure a fair statement of the law, but in part goes beyond the rulings of the Supreme Court, as they are set out in our Point I. Defendant's rights were fully protected

by the instructions given in that they encompass all the law necessary to a proper determination of the merits of the matter.

We deny that error occurred. But if it did, under all the circumstances it was not prejudicial error.

CONCLUSION

Appellant's points are without merit and his appeal should be dismissed.

Respectfully submitted,

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Dated August 23, 1960.